92-725 (1)

No. .....

FILED
OCT 16 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,

Petitioner,

v.

RICHARD ALLAN MORAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

I. Whether federal courts can require a heightened standard of mental competency when a state criminal defendant (1) enters a plea of guilty, and (2) waives counsel.

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No. _____

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v.

RICHARD ALLAN MORAN

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Salvador Godinez[1], Warden of the Ely State Prison, Nevada Department of Prisons, and files this petition for writ of certiorari seeking a reversal of the opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 30, 1992, and is reproduced in Appendix A. Moran v. Godinez, ____ F.2d _____ (9th Cir. 1992). The federal district court's opinion which immediately preceded the circuit court litigation is reproduced in Appendix B.

[1] The named Petitioner, Salvador Godinez, as Warden of the Ely State Prison, Nevada Department of Prisons, had custody of respondent Moran at the time of the filing of the petition for writ of habeas corpus in the United States District Court. Since the filing of the petition for writ of habeas corpus in the United States District Court, Godinez has been succeeded by Sherman Hatcher as Warden of the Ely State Prison. Petitioner is referred to hereinafter as the State.

On direct appeal from the state court convictions, the Nevada Supreme Court entered its published opinion on March 31, 1987. It is reproduced in Appendix C. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987). The order of the Eighth Judicial District Court of the State of Nevada, County of Clark, denying post-conviction relief, was filed on May 10, 1988. It is reproduced in Appendix D. The Nevada Supreme Court's unpublished order dismissing appeal from the denial of relief on the petition for post-conviction relief was filed on March 15, 1989. It is reproduced in Appendix E. This Court denied certiorari on October 2, 1989. It is reproduced in Appendix F.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus petition in March, 1991. See 28 U.S.C. §§ 1331, 2241, 2254. An appeal was taken by respondent

following the denial of habeas relief and the issuance of a certificate of probable cause. See id., §§ 1291, 2253. The judgment of the Court of Appeals for the Ninth Circuit was filed on July 30, 1992. This petition for writ of certiorari is filed within 90 days of the judgment of the Court of Appeals below. Supreme Court Rule 20. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

Since this action concerns constitutional issues, there are no federal statutory provisions involved.

STATEMENT OF THE CASE

The State has lawful custody of respondent Richard Allen Moran [hereinafter referred to as MORAN] pursuant to two convictions for first degree murder and resultant sentences of death imposed in the Eighth Judicial District Court of the State

of Nevada, in and for the County of Clark, district court case, along with two counts of robbery with the use of a deadly weapon and one count of first degree murder sustained in the same case, with the resultant prison terms imposed thereon. MORAN is also in custody pursuant to a conviction for one count of first degree murder and the resultant term of life imprisonment without the possibility of parole sustained in another case in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. The first set of charges [hereinafter referred to as the Red Pearl Saloon offenses] proceeded through the criminal justice system separately from the third murder offense [hereinafter the Vandevoort murder]. Eventually, criminal informations were filed in both cases in the same trial court. Thereafter, MORAN appeared before the trial court judge, Judge Leavitt, with attorneys assigned to each case. After a

canvass, the court allowed MORAN to discharge counsel and to waive his right to the assistance of an attorney After an extensive canvass, the court (1) accepted MORAN's pleas of guilty to all charges in both cases; (2) scheduled imposition of court sentencing on the non-capital charges; (3) accepted MORAN's accession to a consolidated penalty hearing on both cases; and (4) scheduled the penalty hearing on the capital charges.

On December 17, 1984, MORAN appeared before Judge Leavitt in proper person. The judge advised him that in the judge's opinion, it was unwise on MORAN's part not to have the assistance of an attorney and the court confirmed MORAN's previous assertion that he did not wish to have standby counsel to assist him. The court asked MORAN if he wanted to reconsider either of those decisions and to have the assistance of an attorney. MORAN indicated that he did

not. Additionally, MORAN indicated that he did not want to withdraw his plea in either case. MORAN further indicated that he did not wish to have any witnesses present on his behalf at the penalty hearing.

On January 21, 1985, MORAN appeared without counsel for sentencing on the non-capital counts. The court ordered imposition of consecutive fifteen (15) year terms for the robbery counts and use enhancements, as well as the arson count. A separate judgment thereon was entered thereon was entered on January 21, 1985.

Later that same day, a three judge panel consisting of Judge Leavitt, Carson City District Judge Michael E. Fondi and Washoe County District Judge Peter I. Breen, convened to consider evidence pertaining to the penalty to be imposed on the three murder counts. In the Red Pearl Saloon murders, the panel found the existence of two aggravating circumstances beyond a

reasonable doubt. It also found the existence of two mitigating circumstances. The panel found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and set the penalty at death as to both counts.

In the Vandevoort murder, the panel found the existence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of one mitigating circumstance. The court found that beyond a reasonable doubt, the mitigating circumstance was insufficient to outweigh the aggravating circumstances. It set the penalty at death. A Judgment of Conviction on each of the murder counts was entered on January 21, 1985.

Thereafter, the cases proceeded on to litigation on direct appeal to the Nevada Supreme Court. The cases were consolidated for the court's consideration. On March 31,

1987, the court issued its published opinion affirming all convictions and sentences in the Red Pearl Saloon case. It modified the sentence for the Vandevoort murder from death to life without the possibility of parole.

On July 30, 1987, MORAN filed a petition for post-conviction relief in the same trial court. After a response from the state and an evidentiary hearing, the court entered its order denying post-conviction relief on May 10, 1988. From that denial, MORAN appealed to the Nevada Supreme Court. On March 15, 1989, the Nevada Supreme Court entered its unpublished order dismissing appeal, denying relief as to each of the challenges the convictions and sentences.

Thereafter, MORAN sought certiorari from this Court. After the state opposed the certiorari request, this Court denied certiorari.

Thereafter, MORAN filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. That petition was denied by the United States District Court, District of Nevada, unofficial northern division, in its memorandum decision and order entered March 11, 1991. From that denial, MORAN appealed to the United States Court of Appeals for the Ninth Circuit. On July 30, 1992, the United States Court of Appeals for the Ninth Circuit entered its opinion reversing the district court judgment denying habeas relief and remanding with instructions. In this opinion, the court held that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. Specifically, the court held that this heightened level standard was required when MORAN waived counsel and when he pled guilty. The State now seeks review of the

circuit court's opinion with this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

There are special and important reasons for granting the writ. The Ninth Circuit has decided important questions of law in ways which conflict with most other federal circuit courts by requiring a heightened standard of mental competency when an individual enters a plea of guilty or waives his right to counsel compared to when he goes to trial.

Secondly, the lower court decided an important question of constitutional law which has not been, but should be, settled by this Court. In Dusky v. United States, 362 U.S. 402, 50 S.Ct. 788, 4 L.Ed.2d 824 (1960), this court announced the standard for mental competency to stand trial. The overwhelming number of circuits have applied this same standard to an entry of plea. However, the Ninth Circuit Court of Appeals

has created a heightened standard for mental competency to enter a plea and/or to waive counsel. Therefore, this Court should take the opportunity to enunciate the standard for mental competency to enter a plea and waive counsel.

Furthermore, the Ninth Circuit Court of Appeals has cast aside the findings of the state court and lower federal court because neither applied this heightened standard (although the standard had not been urged upon them in previous proceedings).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NO LESS THAN EIGHT FEDERAL COURTS OF APPEAL REGARDING THIS SAME ISSUE, AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(a) OF THIS COURT.

It is the State's position that the circuit court erred in concluding that a heightened standard for mental competency was required for a waiver of counsel and a

plea of guilty. Even though MORAN had been found to be competent to stand trial, the circuit court incorrectly concluded that there is a higher "reasoned choice" standard to determine the competency of an individual to waive his right to counsel and to enter a plea of guilty. The vast majority of the circuits examining the question of what degree of mental competency is necessary to plead guilty have concluded that the standard of competency to plead is the same as the standard of competency to stand trial. See Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1975); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975); United States v. Simmons, 961 F.2d 183 (11th Cir. 1992); Wolff v. United States, 430 F.2d 443 (10th Cir. 1970); Butler v. United States, 384 F.2d 522 (8th Cir. 1967); Stanley v.

Lockhart, 941 F.2d 707 (8th Cir. 1991); United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960). At a minimum, all of these circuits heretofore mentioned have actually applied the standard of mental competency to stand trial as the standard used to enter a plea of guilty. The remainder have stated outright that the standard of mental competency to be applied at the time of entry of plea is the same as that for trial. The only circuits that have applied a contrary and higher standard are the Ninth Circuit Court of Appeals and the District of Columbia Court of Appeals. See Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

In enunciating the standard, most courts usually cite the standard announced in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). That standard states that the "test must be

whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as a factual understanding of the proceedings against him." See discussion in Allard v. Helgemoe, supra, at p.4. While admittedly, the Dusky standard involved the issue of mental competency to stand trial, this language has generally been used to establish the standard for entering a plea of guilty. The Ninth Circuit Court of Appeals takes the position the standard of competency should be higher for the entry of a plea than that applied to a person wishing to stand trial. The reasons stated by the Ninth Circuit Court of Appeals in applying a heightened standard of mental competency in order to plead guilty have been considered and rejected by other circuits. See e.g. Malinauskas v. United States, supra at pp.652-654. Specifically,

the lower court concluded that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning - the capacity for a "reasoned choice" - than that required to stand trial. However, other circuits have held that the standard is the same; that is, whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.

II. THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(c) OF THIS COURT.

This Court set out the standard for judging an individual's competency to stand trial in Dusky v. United States, supra, in the following language: "[T]he test must be whether [the defendant] has sufficient

present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." This Court has never considered the precise issue of whether the standard for mental competency of an accused to voluntarily plead guilty is the same as that to stand trial. With the exception of two circuits, the Ninth Circuit and the D.C. Circuit, nearly all of the remaining circuits have interpreted the Dusky standard to apply to pleas of guilty. See Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1975); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975); United States v. Simmons, 961 F.2d 183 (11th Cir. 1992); Wolff v. United States, 430 F.2d 443 (10th Cir. 1970); Butler v. United States, 384

F.2d 522 (8th Cir. 1967); Stanley v. Lockhart, 941 F.2d 707 (8th Cir. 1991); United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960). Contrary, Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976). The reasoning underlying the decision in Dusky, while convincing to many circuits, has concededly remained unsettled by this Court. The Ninth Circuit Court of Appeals' interpretation not only impacts state habeas petitioners, but federal defendants as well. Therefore, this Court should take this opportunity to consider the issue and to enunciate the state of the law pertaining to the standard of mental competency to enter a plea of guilty and to waive counsel.

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III. THE DISREGARD OF THE STATE COURT FINDINGS AND THE FEDERAL DISTRICT COURT FINDINGS BY THE NINTH CIRCUIT COURT OF APPEALS IS ANOTHER COMPELLING REASON TO GRANT THE WRIT.

A third reason for granting certiorari in this case relates to the Ninth Circuit Court of Appeals' disregard for the state court findings and even the lower district court findings on this issue. The findings of historical fact of the state courts are entitled to deference in this Court. 28 U.S.C. § 2254(d). The Ninth Circuit Court of Appeals simply did not apply that standard. In line with apparent continuing opposition to state death penalty cases, the panel below chose to disregard not only the trial court's findings and the Nevada Supreme Court's findings, but the findings of the federal district court. The state trial court not only conducted an extensive canvass of MORAN, but also conducted an evidentiary hearing on the issue of MORAN's mental competency to enter his plea of

guilty and to waive counsel. The trial court had an opportunity to observe the demeanor of MORAN and to weigh the evidence in general. There was no question that in the court's mind MORAN was mentally competent to enter his plea of guilty and to waive counsel. The Ninth Circuit Court of Appeals has cast aside those findings and concluded that the state court didn't apply the right standard. This standard had never been urged upon any of the courts, state or federal, in previous proceedings. In reality, the Ninth Circuit Court of Appeals has substituted its judgment for that of the state trial court, based on its reading of the cold and naked transcript of the state court hearings.

Left intact, the Ninth Circuit Court's holding virtually ensures a stream of claims from state prisoners within the Ninth Circuit Court of Appeals that they were mentally incompetent at the time of entry

of their pleas. As it stands, the circuit court's opinion imposes a greater standard of mental competency to enter a plea of guilty than is mandated by the Constitution or this Court. This Court should take the opportunity to address the impropriety of the Ninth Circuit's approach, which is inconsistent with this Court's prior holdings as well as in conflict with nearly every other circuit court of appeals.

CONCLUSION

For the reasons stated above, the petitioner asks that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue and that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ALLAN MORAN, Petitioner-Appellant,	No. 91-15609
vs.	D.C. No. CV-N-89-819-HDM
SALVADOR GODINEZ, Warden, Respondent-Appellee.	OPINION

Appeal from the United States District Court for the District of Nevada
Howard D. McKibben
District Judge, Presiding

Argued and Submitted
February 19, 1992 -- Pasadena, California

Filed July 30, 1992

Before: Jerome Farris, Harry Pregerson, and David R. Thompson, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Individual Rights/Constitutional Rights/ Criminal Law and Procedure/Defendants and Accused, Rights of/Due Process/Right of Counsel

Reversing a district court judgment denying habeas relief and remanding with instructions, the court of appeals held that

the Nevada state court's failure to hold a hearing to determine appellant's competency to discharge his counsel and plea guilty to capital murder, thus waiving a number of constitutional rights and resulting in the imposition of the death penalty, as opposed to determining his competency to stand trial on the basis of inadequate psychiatric reports so couched, was a violation of due process.

In November, 1984, appellant Richard Allan Moran appeared before the Nevada state court on charges of capital murder while still recovering from a suicide attempt after having killed three individuals. At that time, while stating that he was taking four different kinds of medication, and absent any further inquiry by the court, he discharged his counsel, changed his pleas to guilty, refused the court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on

his behalf. The state court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses. Moran was sentenced to death. In 1987, Moran filed a petition for postconviction relief in state court, alleging that he was not legally competent to waive his right to counsel and enter guilty pleas in 1984. After an evidentiary hearing, the state court concluded that Moran had been competent to waive counsel in 1984 and failed to prove that his guilty pleas were involuntary. The Nevada Supreme Court affirmed. A petition for habeas relief was denied by the district court.

[1] The court stated that when Moran discharged his counsel and pled guilty, he effectively waived his right to counsel, compulsory process, confront witnesses, a

public trial, a jury of his peers, and his privilege against self-incrimination. Because such an extensive waiver of constitutional rights demands "utmost solicitude" from courts, the court is required to indulge in every reasonable presumption against waiver of constitutional rights. [2] In this case, there was substantial evidence available at the time Moran pled guilty to trigger a good faith doubt in the state court about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights. Not only had Moran attempted suicide and all of his responses to the state court's questions were monosyllabic, but he apprised that court that he was taking medication and was specifically discharging his counsel to ensure that no mitigating evidence was presented on his behalf at his sentence. [3] Due process required the state court to hold a hearing to evaluate and determine

Moran's competency to waive constitutional rights before it accepted his decision to discharge counsel and change his plea. The state court failed to do this at the plea hearing. [4] This error was not cured by the postconviction hearing held more than three years later because the state court's ruling that Moran had been competent to waive his constitutional rights was premised on the wrong legal standard of competency. [5] Even if the presumption of correctness could apply to a state court's finding that a defendant was competent to waive constitutional rights, it could not apply in this case because of the wrong legal standard used to evaluate Moran's competency. [6] The correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning -- the capacity for "reasoned choice" -- than that required to stand trial. [7] Psychiatric reports relied on

by the state court, and prepared solely to determine Moran's competency to stand trial in 1984, never addressed the question of whether Moran was competent to waive counsel or plead guilty, and were the sole support for the state court's postconviction ruling that Moran was competent to waive counsel. By relying solely on the psychiatrists' conclusions that Moran had been competent to stand trial three years earlier, the state court applied the wrong legal standard for determining Moran's competency to waive his constitutional right to counsel in 1987. [8] Neither could the court conclude that the state court applied the proper standard of competency to the question of whether Moran was competent to plead guilty. The same erroneous standard of competency was applied when the state court concluded that Moran failed to prove that his guilty pleas were involuntary.

[9] Nonetheless, when the court examined the record in light of the correct legal standard, the court concluded that it could not support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights. [10] Although the psychiatric observations relied on by the state court were relevant to the question of whether Moran was competent to stand trial, they were inadequate to show that he was competent, according to the higher standard of reasoned choice, to make a valid waiver of constitutional rights.

COUNSEL

Cal J. Potter, III, Las Vegas, Nevada, for the petitioner-appellant.

Stuart J. Newman, Deputy Attorney General, Carson City, Nevada, for the respondent-appellee.

OPINION

PREGERSON, Circuit Judge:

Richard Moran was convicted and sentenced to death by a Nevada state court for three counts of capital murder. After exhausting his state remedies, Moran filed a petition in federal district court for a writ of habeas corpus. The district court denied Moran's petition and Moran appeals. For the reasons set forth below, we reverse.

I.

Richard Moran was still recovering from a suicide attempt in which he had slashed his wrists and shot himself in the abdomen when he appeared before a Nevada state court in November 1984 charged with three counts of capital murder. At that time, he discharged his counsel, changed his pleas to guilty, refused the court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on his behalf. Moran expressed extreme remorse over shooting and killing two people at the Red Pearl Saloon and then shooting and killing

his ex-wife Linda Vandervoort at her home several days later.

On the day that Richard Moran discharged his counsel and changed his pleas, he was taking four different kinds of drugs. When the state judge asked Moran if he were taking drugs, he replied that he was on medication. The state judge inquired no further on this issue. The court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses. In January 1985, a three-judge sentencing panel of the state court sentenced Moran to death.[1]

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[1] Under Nevada Law, the sentencing hearing for first-degree murder is conducted by a three-member panel of state judges in cases where the defendant was tried without a jury. Nev. Rev. Stat. Ann. § 175.552. The method of execution is lethal injection. Nev. Rev. Stat. Ann. § 176.355.

In July 1987, Moran filed a petition in state court for postconviction relief alleging that in November 1984 he was not legally competent to waive his right to counsel and to enter pleas of guilty. After an evidentiary hearing in April 1988, the state court concluded that Moran had been competent to waive counsel in November 1984 and that he had failed to prove that his guilty pleas were involuntary. The Nevada Supreme Court affirmed.

The federal district court denied Moran's petition for a writ of habeas corpus. On appeal, Moran maintains that he was not legally competent to make a voluntary, knowing, and intelligent waiver of constitutional rights at the time he discharged his counsel and changed his pleas to guilty.

We review the district court's denial of Moran's habeas petition de novo. *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987),

cert. denied, 488 U.S. 871 (1988) (citing *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), *cert. denied*, 474 U.S. 841 (1985)). We agree with Moran that the record does not support a conclusion that he was competent to make a valid waiver of constitutional rights.[2]

II.

[1] When Moran discharged his counsel and pled guilty, he effectively waived a number of constitutional rights. In particular, Moran waived his right to counsel, to compulsory process, to confront witnesses, to a public trial, to a jury of his peers, and his privilege against self-incrimination. *See Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Sieling v. Eyman*, 478 F.2d 211, 214 (9th Cir. 1973). Such an extensive waiver of constitutional rights

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[2] Consequently, we need not reach the other issues raised by Moran on appeal.

demands "utmost solicitude" from courts. *Sieling*, 478 F.2d at 214 (citing *Boykin*, 395 U.S. at 243). We must indulge in every reasonable presumption against waiver of constitutional rights. *Evans v. Raines*, 800 F.2d 884, 885 (9th Cir. 1986) (hereinafter *Evans II*).

Due process requires a court to initiate a competency hearing, on its own motion if necessary, whenever it has or should have a good faith doubt about a defendant's competency to waive constitutional rights. *Seiling v. Eyman*, 478 F.2d 211 (9th Cir. 1973) (competency to enter a guilty plea); *Chavez v. United States*, 656 F.2d 312 (9th Cir. 1981) (same); *Evans v. Raines*, 705 F.2d 1479 (9th Cir. 1973) (hereinafter *EvansI*) (competency to waive counsel); *Harding v. Lewis*, 834 F.2d 853 (9th Cir. 1987) (same), *cert. denied*, 488 U.S. 871 (1988). A good faith doubt should arise if there is substantial evidence of incompe-

tence. *Harding*, 834 F.2d at 856 (citing *United States v. Veatch*, 674 F.2d 1217, 1223 (9th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982)).

[2] In Moran's case, there was substantial evidence available at the time he pled guilty to trigger a good faith doubt about his competency to waive constitutional rights. Moran had attempted suicide only a few months before his plea hearing.[3] In addition, Moran stated at the plea hearing that he wanted to fire his attorney to ensure that no mitigating evidence would be presented on his behalf at sentencing. Reporter's Transcript of Plea Hearing, November 24, 1985 at 11. The transcript of the plea hearing shows that virtually all of Moran's responses to the court's ques-

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[3] In *Drope v. Missouri*, 420 U.S. 162, 180 (1975), the Supreme Court relied on Drope's recent suicide attempt as one of the factors supporting its conclusion that the state court should have held a hearing to determine his competency to stand trial.

tions were monosyllabic. Furthermore, at the time he discharged his counsel and changed his pleas to guilty, Moran was taking four different kinds of medication, including Inderal, Dilantin, Phenobarbitol, and Vistaril. Amended Petition for Writ of Habeas Corpus, U.S. District Court for the District of Nevada, Exhibit III.[4] Although the transcript shows that Moran advised the court that he was taking medication, no further inquiry was made on this subject.

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[4] Inderal, commonly known as a "beta-blocker," is used in the management of hypertension. Physicians' Desk Reference (42d ed. 1988) at 650-52; Docket No. 26, Exhibit III (PDR excerpts). Dilantin is an antiepileptic drug which inhibits the spread of seizure activity in the motor cortex and is related to barbiturates in its chemical structure. *Id.* at 1543-45. Vistaril is used for the relief of anxiety and tension associated with psychoneurosis. It acts on certain key regions of the sub-cortical area of the central nervous system. *Id.* at 1625-26. Phenobarbitol is a sedative generally used in conjunction with other drugs to counteract central nervous system stimulation. *Id.* at 1667-68.

Reporter's Transcript of Plea Hearing, November 24, 1985 at 12.

[3] Given the record in this case, the state court should have entertained good faith doubt about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights. Due process therefore requires the court to hold a hearing to evaluate and determine Moran's competency to waive constitutional rights before it accepted its decision to discharge counsel and change his pleas. This the state court failed to do.

III.

[4] Respondent contends that any error made when the state court failed to inquire into Moran's competency to waive constitutional rights at the plea hearing was cured by the postconviction hearing held more than three years later. We disagree.

After the postconviction hearing, the state court ruled that Moran was competent

to waive counsel and that he failed to meet his burden of proving that his pleas were involuntary. For two reasons, this ruling did not constitute a valid finding that, in November 1984, Moran was competent to waive his constitutional rights. First, the state court's postconviction ruling was premised on the wrong legal standard of competency. Second, as we discussed in part B. below, an examination of the record in light of the correct legal standard does not show that Moran was competent to waive his constitutional rights.

A.

[5] It is unclear whether the presumption of correctness accorded to a state court's findings of fact under 28 U.S.C. § 2254(d)[5] extends to a state court's finding

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[5] Section 2254(d) of Title 28, U.S. Code provides that:

> In any proceeding in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a (continued...)

that a defendant was competent to waive constitutional rights.[6] Even if the pre-

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[5](...continued)

> determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct . . . .

[6] *Creech v. Arave*, 947 F.2d 873, 879 n.5 (9th Cir. 1991) ("It is unclear whether a state court's determination of competency to plead guilty is entitled to a presumption of correctness under 28 U.S.C. § 2254(d)," and comparing *Harding*, where we applied the de novo review standard to competency to waive counsel, with *Evans II*, 800 F.2d at 887), *cert. granted*, 60 U.S.L.W. 3841 (U.S. June 15, 1992) (No. 91-1160). *See also Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988) ("In this circuit, a federal court must conduct an independent review of the validity of a waiver."); *Grooms v. Kinney*, 826 F.2d 883, 887 (9th Cir. 1987) (citing the holding in *Miller v. Fenton*, 474 U.S. 104 (1985), that voluntariness of a confession is subject to independent federal review, in discussing whether waiver of counsel was knowing, voluntary, and intelligent).

A different reading of the case suggests that our circuit is not split on the question whether a state court's competency determination is entitled to the presumption of correctness under section 2254(d). The question turns on the issue (continued...)

sumption of correctness could apply to a state court's finding that a defendant was competent to waive constitutional rights, it cannot apply in Moran's case. This is so because, as the following discussion demonstrates, the state court applied the wrong legal standard to evaluate Moran's competency to waive constitutional rights.

[6] The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional

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[6](...continued)
for review. Whether a defendant's waiver was knowing and intelligent is a mixed question of law and fact that we review de novo. *See Harding*, 834 F.2d at 857. Competency determinations, however, have been accorded the presumption of correctness. *See Evans II*, 800 F.2d at 886-87 (competency to waive counsel). It is not clear that these two propositions are in conflict. *Cf. Miller v Fenton*, 474 U.S. at 116-117 (contrasting state court determinations of a defendant's competency to stand trial with voluntariness of confessions); *Harding*, 834 F.2d at 856-59 (discussing competency to waive counsel, on the one hand, and knowing and intelligent waiver on the other, in separate sections).

rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. *See Harding*, 834 F.2d at 856; *Evans II*, 800 F.2d at 887; *Chavez*, 656 F.2d at 518. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); *Sieling*, 478 F.2d at 214. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. *See Evans I*, 705 F.2d at 1480; *Chavez*, 656 F.2d at 518; *United States v. Aponte*, 591 F.2d 1247, 1249 (9th Cir. 1978).

Our analysis of the order issued after the state postconviction hearing reveals

that the state court erroneously applied the standard for evaluating competency to stand trial, instead of the correct "reasoned choice" standard.

1.

In its order denying postconviction relief, the state court, in a single sentence, sought to resolve the question whether Moran had been competent to waive counsel. The court concluded that "[a]s to the claims of mentally incompetent to represent himself, the record clearly shows that he was examined by two psychiatrists both of whom declared defendant competent."

The reports to which the state court referred were both prepared to determine Moran's competency to stand trial, not his competency to waive constitutional rights. Dr. O'Gorman and Dr. Jurasky were appointed by the state court solely to consider Moran's competency to stand trial. Neither doctor considered the question whether Moran

was competent to waive counsel or to plead guilty. At the time of the examinations, Moran had not yet decided to do either, so the question of competency to waive constitutional rights was simply not before the doctors.[7]

[7] The conclusions of the psychiatrists were the sole support for the state court's postconviction ruling that Moran was competent to waive counsel. By relying solely on the psychiatrists' conclusions that Moran was competent to stand trial more than three years earlier, the state court applied the wrong legal standard for determining Moran's competency to waive his constitutional right to counsel.

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[7] Dr. O'Gorman interviewed Moran on September 12, 1984. Dr. Jurasky visited Moran on September 17, 1984. Moran waived counsel and pled guilty on November 28, 1984.

The state court did not articulate the standard of competency it used to evaluate Moran's contention that he was incompetent to plead guilty. As noted above, the state court's order denying postconviction relief contained but one reference to the standard of competency. That single reference is found in one sentence disposing of Moran's contention that he was incompetent to waive counsel. In that sentence, the court erroneously applied the standard for competency to stand trial, not the higher reasoned choice standard required to determine competency to make a valid waive of constitutional rights.

Because the state court order contained in a solitary reference to one standard of competency, we must assume that the state court applied that single standard in evaluating Moran's contention that he was incompetent to plead guilty as well as his

contention that he was incompetent to waive his right to counsel. We cannot conclude, therefore, that the state court applied the proper standard of competency to the question whether Moran was competent to plead guilty. *See Townsend v. Sain*, 372 U.S. 293, 315 (1963) (assumption that state court applied the correct legal standard is appropriate unless there is evidence giving reason to suspect that an incorrect legal standard was applied).

[8] In conclusion, the postconviction order issued by the state court does not constitute a valid finding that in November 1984 Moran was competent when he discharged his counsel and changed his pleas to guilty. The state court used the wrong legal standard to reach its conclusion that Moran was competent to waive counsel. That same erroneous standard of competency was applied when the state court concluded that Moran

failed to prove that his guilty pleas were involuntary.

B.

[9] Furthermore, when we examine the record in light of the correct legal standard, we must conclude that it cannot support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights.[8]

[8] Because the state court applied the wrong legal standard of competency, it would be inappropriate for us to infer from the record before us that the state court made additional factual findings necessary to support its legal conclusion. *See Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.) (When a state court rules after an evidentiary hearing, a federal district court assume that the state court found the facts necessary to support its ultimate legal conclusion "unless there is some indication that the state court applied an incorrect legal standard.") (citing *Townsend v. Sain*, 372 U.S. 293, 313-14 (1963)), *cert. denied*, 479 U.S. 867 (1986). If the state court had applied the correct legal standard of competency, we could have inferred, for example, that the court made a finding that Moran's behavior was unimpaired as one factor supporting an ultimate legal conclusion that he was competent to waive his constitutional rights.

In particular, the psychiatric evaluations on which the state court relied do not support the conclusion that Moran was competent to make decisions of such serious import.

Dr. O'Gorman evaluated Moran's competency to stand trial in September 1984, several months before Moran discharged his attorney and changed his pleas. Nor surprisingly, his report on Moran's mental condition focused only on those qualities that reflect competency to stand trial, not the higher level of mental functioning required for a valid waiver of constitutional rights.

Dr. O'Gorman concluded that "the patient [Richard Moran] is knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted." Dr. O'Gorman

Psychiatric Evaluation at 2 (hereinafter "O'Gorman Report").

According to his report, Dr. O'Gorman perceived Moran to have a basic awareness of what was happening to him and of what had happened, though he also noted Moran's difficulty with his memory. *See* O'Gorman Report at 1. Dr. O'Gorman also commented that Moran was depressed and may not make the effort necessary to assist counsel in his own defense. O'Gorman Report at 3.

[10] These observations are relevant to the question whether Moran was competent to stand trial.[9] They are inadequate, however, to show that Moran was competent according to the higher standard of reasoned choice that the law requires for a defendant to make a voluntary, knowing, and intelligent waiver of constitutional rights.

Dr. O'Gorman's report is all the weaker as an indication of Moran's competency to waive his constitutional rights because it says nothing about the effects of any medication. Consequently, the report was inadequate to resolve Moran's contention that his heavily medicated condition rendered him incompetent to waive counsel.

Dr. Jurasky's report offers no additional evidence to indicate that Moran was capable of the reasoned choice necessary for the valid waiver of constitutional rights. Nothing in the Jurasky report speaks to the

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[9] Indeed, Dr. O'Gorman's evaluation of Moran is phrased in terms that accord almost identically with the standard applied to determine competency to stand trial. Dr. O'Gorman's evaluation of Moran mirrors the standard set out by the Supreme Court in *Drope*, 420 U.S. at 171, where the Court defined the constitutional standard for competency to stand trial as "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope* at 171. Dr. O'Gorman's perception that Moran was "fully cognizant" (continued...)

[9](...continued)
of the penalties he faced is also relevant to Moran's competency to stand trial to the extent that it indicates that Moran understood the nature of the proceedings against him.

effects of any medications on Moran. Like Dr. O'Gorman's report, Dr. Jurasky's observations about Moran's mental state were similarly couched in terms relevant to Moran's competency to stand trial. He discusses Moran's ability to aid counsel and assist in his defense, but says nothing pertinent to Moran's capacity for a reasoned choice among alternatives.

V.

For the reasons stated above, we reverse the judgment of the district court. We remand to the district court with instructions to issue the writ within 60 days unless the state court allows Moran to withdraw his guilty pleas, enter new pleas, and proceed to trial with the assistance of counsel.

REVERSED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD ALLAN MORAN, CV-N-89-819-HDM
Petitioner,

vs.

WARDEN SALVADOR GODINEZ, et al.,
Respondents.
_____/

March 13, 1991

MEMORANDUM DECISION AND ORDER

HOWARD D. McKIBBEN, District Court Judge

Petitioner Richard Moran filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Moran challenges the validity of his guilty pleas to three counts of murder with a deadly weapon, two counts of robbery with a deadly weapon, and one count of arson. Moran was sentenced to two death sentences, a life without parole, and numerous years of imprisonment. Moran raises four issues in his petition: first,

he contends he was denied effective assistance of counsel; second, his guilty plea was not entered freely and voluntarily; third, the court erred in consolidating separate criminal incidents, resulting in separate indictments, into a single proceeding; and finally, the court did not properly weigh and consider aggravating and mitigating circumstances.

This court previously determined that Moran had failed to raise issues relating to the use of the underlying robbery as both a predicate for felony murder and as an aggravating circumstance for imposition of the death penalty in violation of his right to due process of law, and that §§ 175.554,[1] 200.030(4)(a)[2] and 200.033[3] violate the

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[1] § 175.554 involves instructions to the jury, determinations, findings, and verdict regarding penalty hearings for first degree murder proceedings.

[2] § 200.030(4) states: "Every person convicted of murder of the first degree shall be punished: (a) By death, only if (continued...)

eighth amendment. Moran was directed to exhaust those issues or withdraw them. See order at docket #37. Moran responded (#39) by withdrawing those issues.

FACTS

In the early morning hours of August 2, 1984, Moran and a companion, Tammy Cortez, entered the Red Pearl Saloon. Present in the bar were the bartender, Sandra Devere, and a customer, Russell Rhoades. Without provocation, Moran fatally shot Devere and Rhoades several times. He then instructed his companion to assist him in taking money from the premises. On August 11th, Moran went to the apartment of his former wife, Linda Vandervoort, and fatally shot her. He then shot himself in

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[2](...continued)
one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

[3] § 200.033 lists what may constitute an aggravating circumstances.

an attempted suicide. While recovering in the hospital, Moran confessed to the three murders.

On September 4, 1984, Moran appeared in the justice court and, against the advice of his attorney, he waived his right to a preliminary hearing regarding the murder of Vandervoort. The following day he again ignored advice from his attorney and waived his right to a preliminary hearing on the murder of Devere and Rhoades. A week later, Moran entered not-guilty pleas to all of the charges. On September 19th, and again on November 28th, two psychiatrists filed their separate competency reports, both finding Moran competent. Also on November 28th, Moran discharged his appointed counsel and entered guilty pleas to all of the charges, despite knowing that the state was seeking the death penalty on all three of the murder charges. On December 17th, the court asked

Moran in the following colloquy if he wished to withdraw the guilty pleas:

> THE COURT: Mr. Moran, on November 28, 1984, you informed the Court that it was your desire to proceed in these cases without the assistance of an attorney. I have previously advised you that it is unwise on your part not to have the assistance of an attorney to guide you and advise you through these proceedings. You have indicated to the Court that you do not even wish to have a standby counsel assist you. Since that hearing you have had time to think about your situation.
>
> Now, as I told you previously, the court cannot force a lawyer upon you if you insist that you want to proceed without the assistance of an attorney. I am of the opinion that you should be represented by an attorney. At this time, Mr. Moran, do you wish to reconsider and have the assistance of an attorney?
>
> THE DEFENDANT: No.
>
> THE COURT: NRS 176.165 allows a person to withdraw a plea of guilty before sentence is imposed. Do you understand that?
>
> THE DEFENDANT: Uh-huh.

THE COURT: Do you wish to exercise that right?

THE DEFENDANT: No, I don't.

Page 2-3, Exhibit 8, Docket #21. Moran thereafter informed the trial judge that he did not want to have any witnesses subpoenaed, nor standby counsel appointed, nor to have anyone investigate the possibility of mitigating evidence. On January 21, 1985, Moran was sentenced to a total of seventy-five (75) years on the robbery and arson charges. The same day the penalty hearing was conducted, the three-judge panel sentenced Moran to death on each of the three murder charges. On direct appeal, the Nevada Supreme Court reduced the death sentence for the murder of Vandervoort to life imprisonment without the possibility of parole.

INEFFECTIVE ASSISTANCE OF COUNSEL

In order to demonstrate ineffective assistance of counsel, Moran must meet the test established in Strickland v.

Washington, 466 U.S. 668 (1984), which first requires him to show that counsel's performance was deficient; i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." Id. at 690. Second, the test requires a showing that the "deficient performance prejudiced the defense"; i.e., that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." Id.

In applying the Strickland test, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. In

reviewing Moran's allegation, the court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

In the event counsel erred in presenting Moran's defense, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Moran must demonstrate that the error prejudiced the defense to compel a finding of ineffective assistance of counsel. Id. at 692. The appropriate test for prejudice is: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Moran proffers two reasons in support of his contention he was denied his right to the effective assistance of counsel. First, he claims that appointed counsel failed to assert any defense on his behalf, even though defenses, such as his inability to form the requisite intent to commit first degree murder, were viable. Moran contends that during the days preceding the two murders on August 2nd, he had been ingesting a substantial amount of drugs; as a consequence, he was incapable of forming the requisite intent to commit the murders, robbery and arson. Second, he asserts his counsel failed to move to suppress a drug-induced confession. He argues that he was under heavy medication when he confessed to the authorities in the hospital. He asserts the confessions were, therefore, not voluntary.

Moran raised these same reasons in a post-conviction proceeding. On appeal, the

Nevada Supreme Court rejected these arguments and concluded that Moran's counsel did discuss potential defenses with him and that any failure to discuss a specific defense did not fall below an objective standard of reasonable representation. See pages 1-3, Order Dismissing Appeal, Exhibit C, Docket #9.

Moran has not presented any evidence that would have been available to his counsel to show that on the day he killed Devere and Rhoades in the bar, he was mentally incapable of forming the intent to kill. The defendant at one point in the proceedings indicated he was ingesting "lotsa drugs" in the days prior to the killing. This conclusory statement is insufficient to establish that Moran's conviction is infirm, or that his counsel failed to provide him with effective representation. Moran has simply not met his burden of showing that on this issue he

was denied his right to the effective assistance of counsel.

Moran has also failed to show the medications that he was taking when he confessed in the hospital would have prevented him from making a voluntary statement. Counsel for Moran have argued what side-effects the types of medications generally have on individuals; they have not presented any evidence that at the time of the confession in the hospital, Moran was incapable of knowingly, intelligently and voluntarily giving a confession because of the medications. Furthermore, Moran confirmed the validity of the confessions during the hearing at which he entered his guilty pleas.

Thus, there is no reasonable probability that a new trial would have resulted in a different verdict given the weight of the evidence against Moran. As stated above, "[a]n error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Accordingly, Moran has failed to meet his burden of showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different"; that is, that there is "[a] reasonable probability . . . sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

VALIDITY OF THE GUILTY PLEAS

Moran alleges that his guilty pleas were not voluntarily entered, nor did the canvass conducted by the court comport with the requirements of Faretta v. California, 422 U.S. 806 (1975).

Voluntariness:

Moran contends he was under the influence of drugs at the time he entered his pleas. During the change of plea

hearing, he was asked whether he was "presently under the influence of any drug or alcohol," to which he responded saying, "Just what they give me in, you know, medications." Page 12, Exhibit A, Docket #9. At that hearing, and again during the post-conviction proceeding, the state trial judge found the pleas to have been voluntarily entered. Moran has not shown that those determinations are incorrect. Although he may have taken prescription drugs prior to the hearing, Moran has not presented any evidence to show that the effect that those medications actually had upon him were such that he was not able to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea to guilty. Moreover, the record does not reflect that the judge, the prosecutor, or the two attorneys initially appointed to represent Moran felt that his mental

faculties were impaired because of the medications he had consumed. Moran has simply failed to present sufficient evidence to meet his burden of showing that the pleas were not voluntarily entered. See 28 U.S.C. §2254(d).

Faretta Canvass:

A defendant has a constitutional right to proceed without counsel and represent himself in a criminal action. Faretta v. California, 422 U.S. 806 (1975). "'Because a defendant normally gives up more than he gains when he elects self-representation,' the district court is required to make 'reasonably certain that he in fact wishes to represent himself.'" United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990), citing Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). Accordingly, the law of this circuit has established two prerequisites to finding that the waiver of counsel is valid: the waiver must be unequivocal,

and it must be made knowingly and intelligently. Id. 913 F.2d at 714. This district is not unfamiliar with the right of self-representation and the requirements of Faretta.

> An accused has a sixth amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and is able and willing to abide by rules of procedure and courtroom protocol. McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S.Ct. 944, 949, 79 L.Ed.2d 122 (1984); United States v. Rylander, 714 F.2d 996, 1005 (9th Cir. 1983). Nevertheless, the trial judge may appoint standby counsel to assist the accused. McKaskle, 465 U.S. at 184, 104 S.Ct. at 954; United States v. Dujanovic, 486 F.2d 182, 187 (9th Cir. 1973).
>
> Before waiving his right to counsel, a defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. United States v. Rylander, supra at 1005; United States v. Harris, 683 F.2d 322, 324 (9th Cir. 1982).

Curry v. Slansky, 637 F.Supp. 947, 950 (D. Nev. 1986).

During the colloquy, the trial judge specifically advised Moran about the preclusive effect that discharging appointed counsel would have on the possibility of later asserting that he was denied the effective assistance of counsel.

> THE COURT: Does the defendant understand that should he waive his right to an attorney, that in all probability, you will not be able to complain at a later time that your right to the assistance of an attorney under the Sixth and Fourteenth Amendment to the United States Constitution were violated; do you understand that?
>
> THE DEFENDANT: Yes, I understand.

Page 8, Exhibit A, Docket #9. Later, the judge asked Moran whether he understood "the possible defenses to the charges in these cases" and whether he had "discussed these with the Public Defenders," to each of which Moran answered yes. Also, the judge asked Moran to indicate why he wanted to represent himself without the assistance of counsel. Moran stated, "Because we don't -- the

Public Defenders and myself don't agree on the way they should defend me. . . . I don't want them to present any mitigating evidence. I don't want this presented, and they have to -- they feel that they have to." Id. at page 11. And further:

> THE COURT: In other words, you do not want to have any -- put up any defense, in effect, is what you're saying?
>
> THE DEFENDANT: Correct.
>
> THE COURT: That you want to enter a plea to the matter and you do not want to present any mitigating circumstances whatsoever before the three-judge panel?
>
> THE DEFENDANT: Right.

Id. at page 11-12. Also, after the judge determined that Moran understood the meaning of standby counsel, Moran stated that he did not want such counsel appointed.

Moreover, simply because a colloquy was not perfect does not ipso facto invalidate the waiver.

> "The preferred procedure to ensure that a waiver is knowingly

> and intelligently made is for the district court to discuss each of the . . . elements with the defendant in open court," although a "limited exception may exist" where by the district court's failure to follow this procedure explicitly "will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver." [United States v. Balough, 820 F.2d 1485], 1488 [(9th Cir. 1987)].

United States v. Robinson, 913 F.2d at 715. Accord, Curry v. Slansky, 637 F.Supp. at 950. ("However, the judge's failure to canvass a defendant with the proper thoroughness is not reversible error where the whole record supports the holding that the waiver was knowing and intelligent. In such a case, the defendant is not prejudiced by the inadequacy of the canvass.") Since a review of the entire record compels the conclusion that the waiver was knowing and intelligent, Moran cannot establish prejudice even if the canvass were inadequate in some way.

CONSOLIDATION OF THE TWO ACTIONS

Moran alleges that his constitutional rights were violated when a single penalty hearing was conducted for the separate criminal information. He consented to the consolidation during the December 17th hearing at which time he was given the opportunity to withdraw his guilty pleas. Page 4 of transcript in Exhibit 8, Docket #21. When this issue was raised on the direct appeal, the Nevada Supreme Court found it to be without merit. See page 6, Exhibit 18, Docket #21. There is no evidence in the record that Moran was prejudiced by the consolidation.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Moran states three grounds for attacking the findings of the three-judge panel with respect to aggravating and mitigating circumstances: (1) whether the aggravating circumstances were sufficient to warrant the imposition of the death penalty; (2) whether the three-judge panel

erred in refusing to find as a mitigating circumstance his use of "lotsa drugs" prior to the two murders; and (3) whether the statutory scheme for weighing aggravating and mitigating circumstances is constitutionally infirm. Moran has withdrawn the third ground in light of the U.S. Supreme Court's recent decision in Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047 (1990). Regarding the second ground, Nev. Rev. Stat. § 200.035 lists mitigating circumstances, the last of which states for "any other mitigating circumstance." The penalty hearing judges who found the existence or absence of aggravating and mitigating circumstances recognized that Moran had stated that he had been under the influence of drugs; however, they specifically stated that they did not find this to be a mitigating circumstance. Page 171, Exhibit 9, Docket #21. The sentencing panel was cognizant of the issue of drugs but

determined such facts did not qualify as a mitigating circumstance. The panel did not abuse its discretion under the facts of this case in reaching that conclusion.

The three-judge panel also did not err in determining that the aggravating circumstances support a sentence of death. The panel found two aggravating circumstances: the murders were committed at random and without apparent motive, Nev. Rev. Stat. § 200.033(9), and Moran created a risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, Nev. Rev. Stat. § 200.033(3). Both of these aggravating circumstances are supported by the record. Moran stated he had no idea why he killed Devere and Rhoades. Moran was seated next to his companion and Rhoades when he, Moran, started shooting. In Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985), the court found the existence of an

aggravating circumstance where the gunman shot the victim while the victim's wife lay on the bed near the line of fire.

Therefore, Moran's petition for writ of habeas corpus (#24) is DENIED.

It is so ORDERED.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEVADA

RICHARD ALLEN MORAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 16300
RICHARD ALLEN MORAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 16301

March 31, 1987 103 Nev. 138, 734 P.2d 712

Appeal from judgments of conviction and three sentences of death in two consolidated cases; Eighth Judicial District Court, Clark County; Myron E. Leavitt, Michael E. Fondi, Peter I. Breen, Judges.

Defendant pleaded guilty to three counts of first degree murder, one count of first degree arson, and one count of burglary, and received three death sentences

for the three murders, in the district court. Defendant appealed. The Supreme Court held that: (1) there were no aggravating circumstances in murder of defendant's former wife, to support death sentence as to that murder; (2) evidence indicating that defendant killed two victims at saloon randomly and without motive was substantial, thus supporting finding of aggravating circumstance; and (3) fact that defendant reached around his companion to shoot victim, who was seated immediately to right of defendant's companion, was sufficient to support finding, as aggravating circumstance, that defendant knowingly created risk of death to more than one person.

Two death sentences affirmed (Appeal No. 16301); one death sentence modified to life imprisonment without the possibility of parole (Appeal No. 16300).

[Rehearing denied June 25, 1987]

Lovell, Bilbray & Potter, Las Vegas, for Appellant.

Brian McKay, Attorney General, Carson City; *Rex Bell*, District Attorney, *James Tuftland*, Deputy District Attorney, Clark County, for Respondent.

1. HOMICIDE.

Murder of defendant's former wife did not involve circumstances such as would justify finding of "depravity of mind," as aggravating circumstance; there was no indication of torture or sadistic acts performed by defendant and wife appeared to have died instantly with no disturbance to her body other than gunshot wounds. NRS 200.033, subd. 8.

2. HOMICIDE.

Evidence did not support finding of aggravating circumstance that murder of defendant's former wife was committed by person who knowingly created risk of death to more than one person; there were no other persons present in apartment when defendant shot his former wife and there was no evidence that any neighbor was at immediate risk of death or that defendant was aware of any other person within close proximity of crime scene. NRS 200.033, subd. 3

3. HOMICIDE.

Although death sentence for murder was not supported by aggravating circumstances, in light of overwhelming evidence of defendant's guilt, sentence of life imprisonment without possibility of parole would be imposed in place of death sentence. NRS 177.055, subd. 3(c), 200.030.

4. HOMICIDE.

Evidence indicating that defendant killed two victims at saloon randomly and without motive was substantial, thus supporting finding of aggravating circum-

stance; by his own admission, suicide notes, and in videotaped confession, defendant stated that he had no idea why he killed victims at saloon. NRS 200.033, subd. 9.

5. HOMICIDE.

Fact that defendant reached around his companion to shoot victim, who was seated immediately to right of defendant's companion, was sufficient to support finding, as aggravating circumstance, that defendant knowingly created risk of death to more than one person. NRS 200.033, subd. 3.

6. HOMICIDE.

Sentences of death for two murders were properly imposed and were not disproportionate to other cases involving similar circumstances; after killing two victims at saloon, defendant robbed and set fire to premises. NRS 177.055, subd. 2(d).

O P I N I O N

Per Curiam:

After a thorough canvass in the guilt phase of the trial in these two consolidated cases, Richard Allen Moran pleaded guilty to three counts of first degree murder, one count of first degree arson, and one count of robbery. At the penalty hearing in the first case a three-judge panel found that the simultaneous shooting deaths of a bartender and customer in a saloon had been committed under two aggravating circum-

stances and two mitigating circumstances. In the second case, for the separate and subsequent shooting death of Moran's former wife, the penalty tribunal found that murder also to have been committed under two aggravating circumstances with one mitigating circumstance. The tribunal found that the aggravating circumstances outweighed the mitigating circumstances in both instances and returned three separate sentences of death, one for each murder. Moran raises several assignments of error concerning the convictions and subsequent death sentences. The only error that warrants reversal is the penalty tribunal's finding of two aggravating circumstances in the murder of Moran's former wife. Moran was fairly convicted and sentenced to death for the other two murders.

On August 2, 1984, at approximately 4:30 a.m., appellant Richard Allen Moran entered the Red Pearl Saloon with Tammy

Cortez. The two took seats at the bar. The two other persons present were the bartender, Sandra DeVere, and Russell Rhoades, a customer. DeVere was located behind the bar immediately in front of and slightly to the left of Moran and Cortez. Rhoades was seated at the bar immediately to Cortez' right with Moran located to Cortez' left. Suddenly and without warning, Moran removed his eight-shot .45 caliber automatic pistol from his belt and shot DeVere four times. Moran then immediately reached behind Cortez and fired the remaining four rounds into Rhoades. Moran then told Cortez to go behind the bar and pick up the change located on the back counter. Unable to open the cash register, Moran carried it out to his vehicle. Moran then started several fires in various locations in the saloon. Moran and Cortez then left the scene.

Nine days later, on August 11, 1984, Moran went to the apartment of Linda

Vandervoort his former wife. Moran and Vandervoort had been divorced six to eight months before the shootings. Without provocation, Moran suddenly fired seven shots at Vandervoort, five of which entered her body. At least two rounds passed through a wall and entered an adjacent apartment, one of which shattered the glass top of a coffee table. The occupant of the adjacent apartment was not home at the time of the shooting. Moran then turned the weapon on himself firing the last round into his abdomen. Being unsuccessful at this suicide attempt, Moran attempted to slit his wrists but could not find a knife or other object sharp enough to accomplish the task. Police found Moran in the bedroom of Vandervoort's apartment upon their arrival. Initially, at the crime scene, Moran claimed the carnage had been performed by intruders. Two days later, however, while in the hospital, Moran summoned police in order to

make his confession. Moran first contends that the evidence does not support the findings by the penalty tribunal of aggravating circumstances necessary for imposition of the sentences of death under NRS 200.030 and NRS 200.033.[1]

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[1] NRS 200.030(4) provides, in pertinent part: "Every person convicted of murder of the first degree shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

NRS 200.033 delineates expressly nine of the aggravating circumstances which may be found in order to impose a sentence of death under NRS 200.030. The pertinent portions of NRS 200.033 which are at issue on this appeal read as follows:

> 200.033 Circumstances aggravating first degree murder. The only circumstances by which murder of the first degree may be aggravated are:
>
> . . . .
>
> 3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

(continued...)

Regarding the Vandervoort murder, the three-judge penalty tribunal found two aggravating circumstances: (1) depravity of mind, NRS 200.033(8), and (2) the murder was committed by a person who knowingly created a risk of death to more than one person by means of a weapon and course of action which was hazardous to the lives of more than one person. NRS 200.033(3).

[Headnote 1]

We agree with the appellant that Vandervoort's murder did not involve circumstances which justified a finding of "depravity of mind." The facts of this case do not exhibit depravity of mind as contemplated in NRS 200.033(8). The circum-

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[1](...continued)

> . . . .
>
> 8. The murder involved torture, depravity of mind or the mutilation of the victim.
>
> 9. The murder was committed upon one or more persons at random and without apparent motive.

stances of this murder were these: After talking with Vandervoort for a few minutes Moran asked her if she had read about the Red Pearl Shootings. As she turned to answer, Moran immediately began firing. There is indication of torture or sadistic acts performed by Moran. Vandervoort appears to have died instantly with no disturbance occurring to her body other than the gunshot wounds. As cold-blooded and malicious as the killing was, under the guidance given to us by the United States Supreme Court, we must conclude that the record does not support a finding of depravity of mind under NRS 200.033(8). Godfrey v. Georgia, 446 U.S. 420 (1970); Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979); *see also* Rogers v. State, 101 Nev. 456, 705 P.2d 644 (1985); Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985).

[Headnote 2]

We must also conclude that the evidence does not support the tribunal's finding that

Vandervoort's murder "was committed by a person who knowingly created a risk of death to more than one person. . . ." NRS 200.033(3). There were no other persons present in the apartment when Moran shot Vandervoort. *See* Nevius v. State, 101 Nev. 238, 669 P.2d 1053 (1985). There is also no evidence showing that any neighbor was at an immediately risk of death nor was Moran aware that any other person was within close proximity of the crime scene. *See* State v. Nash, 694 P.2d 222 (Ariz. 1985). The finding of the second aggravating circumstance in the Vandervoort murder under NRS 200.033(3) therefore cannot stand.

[Headnote 3]

Because neither of the aggravating circumstances in the Vandervoort murder can be sustained, the sentence of death in that case must be reversed. NRS 200.030. However, in light of the overwhelming evidence of Moran's guilt in Vandervoort's murder, a sentence of life imprisonment without the

possibility of parole will be imposed in place of the death sentence. NRS 177.055(3)(c).

Moran next contends that the evidence fails to support the aggravating circumstances found by the penalty tribunal in the Red Pearl Saloon murders.

The first aggravating circumstance found by the tribunal in the Red Pearl case is that the murders were committed upon one or more persons at random and without apparent motive. NRS 200.033(9). By his own admission, in his suicide notes and in his video-taped confession, Moran stated that he had no idea why he killed DeVere and Rhoades at the Red Pearl.

[Headnote 4]

Moran points to the inconsistency of this finding with the fact that Moran was also found guilty of robbery. This fact, Moran claims, provides a definite and apparent motive and therefore negates a finding of an aggravating circumstance under

NRS 200.033(9). However, in viewing the taped confession, when asked by the detective to describe the time at which he formed the intent to rob the saloon, Moran hesitated for a moment and then stated that he probably formed the idea the instant before the shooting. Although these facts may create some conflict, the evidence indicating that Moran killed the two victims at the saloon randomly and without motive is substantial; therefore, the evidence supports a finding of an aggravating circumstance under NRS 200.033(9). *See Deutscher v. State*, above.

Moran also attacks the finding of the second aggravating circumstance in the Red Pearl murders. Under NRS 200.033(3), the tribunal found that Moran knowingly created a risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person. This

finding was based on the fact that Tammy Cortez was seated next to Moran along with the victim, Rhoades, when Moran opened fire. [Headnote 5]

In *Nevius*, above, this court endorsed a finding of this aggravating circumstance where the gunman shot and killed his victim while the victim's wife lay on the bed near the line of fire. 101 Nev. at 243, 699 P.2d at 1056. The fact that Moran reached around Cortez to shoot Rhoades, who was seated immediately to the right of Cortez, is sufficient to support a finding that Moran "knowingly created a risk of death to more than one person." *Nevius v. State*, above; NRS 200.033(3).

Both aggravating circumstances found by the three-judge panel in the Red Pearl murders are soundly supported by the evidence; and, therefore, the two sentences of death for the killing of DeVere and Rhoades must stand.

We have carefully considered Moran's remaining assignments of error and conclude that they are meritless.

NRS 177.055(2)(d) requires this court to review a death sentence to determine whether the sentence is disproportionate to penalties imposed in similar cases throughout the state, taking into consideration the nature of the crime and the defendant.[2] [Headnote 6]

The record reveals that the Red Pearl murders were a senseless and mindless act of violence. During this same unexplained spree, Moran robbed and then set fire to the premises. Under these circumstances, and considering the relative weakness of the

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[2] Although subsection (d) of NRS 177.055(2) was eliminated as of June 6, 1985, as a requirement on appeal of death sentences, the prohibition against *ex post facto* laws requires that a proportionality review be done on this appeal since the murders occurred prior to June 6, 1985. Thompson v. State, 102 Nev. 348, 721 P.2d 1290 (1986).

mitigating circumstances,[3] we conclude that the sentences of death were property imposed and are not disproportionate to other cases involving similar circumstances. *See* Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985); Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985); Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985).

Accordingly, we uphold the two death sentences in Appeal No. 16301, and remand the Vandervoort case, Appeal No. 16300, for resentencing to life imprisonment without the possibility of parole.

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[3] The two mitigating factors found by the tribunal of the Red Pearl case were a lack of prior significant criminal history and Moran's remorse for the killing of DeVere and Rhoades.

APPENDIX D

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA Plaintiff, vs. RICHARD ALLEN MORAN, Defendant.	)	CASE NOS. C67482 and C67483 DEPARTMENT XII DOCKET R

MAY 10, 1988

ORDER DENYING POST-CONVICTION PETITION

MYRON E. LEAVITT, District Judge
Department XII

Petitioner entered pleas of guilty in these consolidated cases to three counts of first degree murder with the use of a deadly weapon, one count of first degree arson and two counts of robbery with the use of a deadly weapon. A three-judge panel was formed consisting of MYRON E. LEAVITT, District Judge; MICHAEL E. FONDI, District Judge; and PETER I. BREEN, District Judge,

and a penalty hearing on the murder charges was held January 21, 1985. Thereafter the panel returned three separate sentences for death for each victim. The defendant also was sentenced to fifteen years for the first degree arson, fifteen years for each robbery count and a consecutive fifteen years in each robbery count for the use of a deadly weapon in the crimes. All sentences were ordered to run consecutively for a total of seventy-five years.

A direct appeal was taken from the Judgments of Conviction and the three sentences of death. On March 31, 1987, the Supreme Court upheld the convictions and two of the death sentences and remanded Case C67482 for resentencing to life imprisonment without the possibility of parole.

Subsequently, on July 30, 1987, the defendant filed herein his petition for post-conviction relief pursuant to NRS 177.315 to 177.385 asserting that his pleas

of guilty were involuntarily entered and that he was denied the effective assistance of counsel. The petition was timely filed within one year from the final decision on appeal. NRS 177.315(3).

A hearing, pursuant to NRS 177.365, on the petition was held on April 20, 1988, and petitioner was informed pursuant to NRS 177.308(3) that all claims which challenge the conviction or imposition of the death sentences must be joined in his present petition and that any matter not included in the petition would not be considered in any subsequent hearing.

At the hearing the State was represented by DAN M. SEATON, ESQ., Chief Deputy District Attorney and the petitioner was represented by CAL POTTER, III, ESQ. The Court having heard the testimony of witnesses; listened to arguments of counsel, read the briefs on the law submitted herein,

and being fully advised in the premises, makes the following:

FINDINGS OF FACT

Defendant, was fully advised of his rights pursuant to the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The defendant waived these rights and made a complete video-taped confession. At the time of the confession he was recovering from surgery and had been given morphine sulfate.

Defendant was on other medication at the time of the entry of his pleas. The medicine was given to defendant because he had suffered seizures as the result of his use of cocaine. At the time of the entry of the pleas, defendant was asked by the Court, "Are you presently under the influence of any drugs or alcohol?" Defendant replied, "Just what they give me in, you know, medication."

Defendant was informed by his Deputy Public Defender that he had no defense to the crimes and that they suggested he concern himself with the penalty phase of the murder cases. He then discharged his public defenders because he didn't want any mitigating circumstances presented and to make sure he received the death penalty.

On reflection, more than three years later, he now concludes that he was so under the influence of drugs at the time of his confession and the entry of the pleas that he has no recollection of his confession or statements made in court. He asserts the medication together with the statement by his public defenders that he had no defense made him want the death penalty.

The record clearly shows that defendant was thoroughly canvassed at the guilt phase of the trial. He knowingly and voluntarily waived his right to counsel and elected to represent himself. Faretta v. California,

422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

During the canvass, defendant indicated that he fully understood the proceedings. The Court made a specific finding that defendant understood the nature of the proceedings and the consequences of his pleas.

Prior to taking the defendant's pleas the defendant was examined as to his mental capacity and a report by a psychiatrist Dr. Jack A. Jurasky indicating defendant was legally competent, was filed in the case and made a part of the record. It was represented that a second psychiatrist, Dr. William D. O'Gorman, had reached the same conclusion. His report was subsequently made a part of the record in the case.

ISSUES PRESENTED

Defendant now claims that his pleas to the three murder charges were involuntary because: a) he was under the influence of

drugs at the time; and, b) he was mentally incompetent to represent himself.

He further states he was denied effective assistance of counsel in that his public defender failed to assert the defense that his confession was "drug-induced."

From the foregoing Findings of Fact and Issues Presented, this Court determines the following:

CONCLUSIONS OF LAW

VOLUNTARINESS OF PLEA

In reviewing the validity of a guilty plea the entire record of the case must be examined ". . . to determine whether the plea was valid, either by reason of the plea canvass itself or under the totality of the circumstances approach." Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). The guilty plea should be viewed as ". . . presumptively valid and the burden should be on the defendant to establish that the plea was not entered knowingly and intelli-

gently." Wingfield v. State, 91 Nev. 336, 535 P.2d 1295 (1975).

Here, The defendant did not present evidence as to the effect on him of any drugs he may have ingested prior to the entry of the plea. The defendant merely testified he was depressed and desired the death penalty. Such evidence is not sufficient to make a plea involuntary. See generally, Lizotte v. State, 102 Nev. 238, 720 P.2d 1212 (1986).

As to the claims of being mentally incompetent to represent himself, the record clearly shows that he was examined by two psychiatrists both of whom declared defendant competent.

Defendant has failed to meet his burden that the pleas were involuntarily entered.

INEFFECTIVE ASSISTANCE OF COUNSEL

The right to be represented by an attorney is fundamental and essential to be a fair trial and is guaranteed to one

accused of a felony under the Sixth Amendment to the United States Constitution.

In order for the right to be meaningful, the attorney representing the accused must be effective. The standard in measuring the attorney's performance is whether the accused received "reasonably effective assistance" from his counsel. Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

Before a claim by a convicted defendant of ineffective assistance of counsel can be successful in reversing or setting aside a conviction the defendant must prove, "first, that counsel's performance was deficient, and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

One who complains of ineffectiveness of counsel's assistance has the burden to

prove that such representation was not "within the range of competence demanded of attorneys in criminal cases," and ". . . fell below an objective standard of reasonableness." Strickland, supra.

He must "identify the acts of omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and a strong presumption exists that the attorney's "conduct falls within the wide range of reasonable professional assistance." Strickland, supra.

Even if the presumption is overcome, the convicted defendant must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra.

Here, defendant states the failure of the public defender to present the defense that his confession was "drug-induced" was ineffective assistance of counsel. He

claims his later confessions and statements at the entry of plea were given because the public defender told him he had no defenses.

There is no evidence as to the effect on defendant of the morphine sulfate given to him on the day of the confession. The video-taped statements were given after he had been informed of his rights and he voluntarily waived those rights. He subsequently repeated those confessions and statements in open court after again being advised of his rights.

Any failure to contest the video-taped confession was made moot by defendant's own acknowledgement of guilt at the plea hearing while acting as his own attorney. There is no showing that the result of the proceeding would have been different.

THEREFORE, by reason of foregoing, it is hereby

ORDERED, the Petition for Post-Conviction Relief be and the same is denied. It is further

ORDERED, that the stay of execution previously entered in this case is vacated. It is further

ORDERED, that a copy of this order be mailed forthwith to petitioner, RICHARD ALLEN MORAN, P. O. Box 607, Carson City, Nevada 89702, CAL POTTER, III, ESQ., Attorney for the Petitioner, 428 South Fourth Street, Las Vegas, Nevada 89101, DAN M. SEATON, ESQ., Chief Deputy District Attorney, Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada 89155, BRIAN McKAY, ESQ., Attorney General, Capitol Complex, Carson City, Nevada 89710, and GEORGE SUMNER, Director, Nevada Department of Prisons, P. O. Box 200, Carson City, Nevada 89702.

APPENDIX E

IN THE SUPREME COURT OF
THE STATE OF NEVADA

RICHARD ALLEN, Appellant, vs. WARDEN, NEVADA STATE PRISON, GEORGE SUMNER and THE STATE OF NEVADA, Respondents.	)	No. 19161

March 15, 1989

ORDER DISMISSING APPEAL

Appellant Richard Allen Moran pleaded guilty to three murders, two robberies and arson. A three-judge panel sentenced him to death for each of the three murders and to a total of seventy-five years in prison for the robberies and arson. We subsequently affirm two of the death penalties, but reduce the third to a life prison sentence without possibility of parole.

Following that appeal, Moran filed motions for post-conviction relief in which he claimed he was denied his right to the

effective assistance of counsel and that his guilty plea was involuntary. Moran now asserts that the district court erred in denying those motions. We disagree.

Moran bases his ineffective assistance of counsel claim on his assertion that his attorneys failed to pursue or advise him of potential defenses. Specifically, Moran argues that his counsel could have but did not argue that because Moran was under the influence of drugs, he could neither form the intent to commit first-degree murder, nor voluntarily confess to the murder.

After reviewing the record, we conclude that counsel's failure to advise Moran of these potential defenses did not fall below an objective standard of reasonable representation.

See Strickland v. Washington, 466 U.S. 668, 688 (1984). All of the psychiatric evidence available to the attorneys at the time Moran dismissed them, including the

opinion of Dr. O'Gorman,[1] indicated that Moran "could distinguish between right and wrong" and "understood the nature of his acts" when he committed the murders. In light of the evidence they had, Moran's attorneys cannot be faulted for failing to inform Moran at that time that the lack of intent defense may have been available in his case. Further, Moran's counsel cannot be faulted for failing to attempt to suppress a confession which we, in the earlier appeal of this case, concluded to be valid. See Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987).[2]

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[1] Dr. O'Gorman eventually issued a written report in which he concluded that Moran may not have been able to form the intent to kill because he was under the influence of cocaine.

[2] The validity of Moran's confession was one of the issues resolved in our statement that "we have carefully considered Moran's remaining assignments of error and conclude that they are meritless." Moran, 103 Nev. at 143.

Finally, a thorough reading of the record reveals that Moran's counsel did discuss potential defenses with him. During the canvass relating to his guilty plea, Moran admitted to the court that he not only understood the possible defenses to the charges he was facing, but he also had discussed those defenses with his attorneys. The fact that Moran's counsel advised him against changing his original not guilty plea also indicates that they planned on presenting a defense on Moran's behalf at the guilt phase of trial.

Even assuming Moran's attorneys were incompetent, Moran fails to show how the attorneys' failure to advise him of the defenses caused any prejudice. The record reveals that Moran dismissed his attorneys and chose to represent himself for the specific purpose of ensuring that no one presented defenses on his behalf. Moran now stands convicted of murder, not because his

attorneys failed to suppress his confession or advise him of a defense, but because Moran himself, contrary to his counsel's advice, elected to represent himself and enter a guilty plea. The fact Moran admitted during the plea canvass that he had discussed possible defenses with his attorneys belies his current contention that he would not have pleaded guilty had he known defenses were available.

Because Moran fails to show either attorney incompetence or prejudice attributable to such incompetence, there is nothing to support his claim that he did not receive his constitutionally guaranteed right to counsel. See Strickland v. Washington, 466 U.S. at 687.

With regard to the issue of the voluntary nature of Moran's guilty plea, we conclude that the thorough plea canvass and the "totality of the circumstances" surrounding the plea are sufficient to support

the district court's discretionary determination that Moran "knowingly and intelligently" pleaded guilty to the crimes in this case. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Before accepting Moran's plea, the district court questioned Moran in detail regarding his understanding of the possible consequences of a guilty plea, the voluntariness of the plea, the elements of the charged crimes, the possible punishments, and his rights at trial and during the penalty phase. Although Moran did tell the court he was receiving medication at the jail, nothing in the record of the canvass in any way suggests that Moran was unable to comprehend what was going on, or that the judge needed to inquire further into the nature of the effect of the mediation. Moran presented no medical evidence in the post-conviction hearing which necessarily established that the medication influenced

him to such an extent that he was unable to understand the meaning and consequences of his plea.

Just as proof of an accused's intoxication does not, without more, prevent the admission of a confession, the evidence that Moran was on medication, standing alone as it does in this case, does not prevent the admission of his guilty plea. See Tucker v. State, 92 Nev. 486, 488, 553 P.2d 951, 952 (1976).

For the foregoing reasons, we hereby ORDER this appeal dismissed.

Supreme Court Justices:

Young
Steffen
Springer
Rose
Whitehead[3]

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[3] The Honorable Jerry C. Whitehead, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable John Mowbray, Justice. Nev. Const., art. 6, §4.

APPENDIX F

IN THE SUPREME COURT OF
THE UNITED STATES

RICHARD ALLEN MORAN, Petitioner, vs. HAROLD WHITLEY, Warden, Respondent.	)	No. 88-7520

October 2, 1989 110 S.Ct. 207 (1989)

Petition for writ of certiorari to the Supreme Court of Nevada.

October 2, 1989. Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.